



Busby, N., & McDermont, M. (2016). Access to justice in employment disputes: private disputes or public concerns. In E. Palmer, T. Cornford, Y. Marique, & A. Guinchard (Eds.), *Access to justice: beyond the policies and politics of austerity* (pp. 175-196). Hart Publishing.

Early version, also known as pre-print

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PDF-document

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## Access to Justice in the Employment Tribunal: Private Disputes or Public Concerns?

Nicole Busby and Morag McDermont

### Introduction

#### ***Brian's Story***

*Brian worked as a car valet for eight years. During this time he experienced verbal abuse and bullying from his manager. Matters came to a head when Brian attended a hospital appointment and his manager phoned him, swearing at him and demanding he return to work. Brian collapsed shortly afterwards and was advised by a nurse not to go back to work. Brian resigned from his job.*

*Brian did not belong to a trade union and could not afford to pay a solicitor for advice. Initially thinking there was nothing he could do, Brian was advised to go to his local Citizens Advice Bureau. Once he became eligible for legal aid the CAB employment solicitor began to act on his behalf. She submitted an Employment Tribunal claim form (ET1) and meticulously prepared Brian's case for constructive dismissal for the hearing.*

*At the hearing Brian had to represent himself. He did not know which documents to hand over or how to arrange for the judge to read out his witness statement (as he was dyslexic). He could not understand many of the judge's questions, or provide a detailed account of the verbal abuse he experienced. The employer similarly represented himself. He also had difficulty following the tribunal protocols and took an aggressive approach throughout.*

*Brian won his case and was made a financial award. His ex-employer threatened Brian and his family in public. Brian eventually received his award, but only after instructing the services of a High Court enforcement officer under the Employment Tribunal Fast Track scheme.*

Brian's story will resonate with many who have been bullied or discriminated against at work or dismissed unfairly. However, Brian was lucky in a number of respects. First, although he had no representation at the Employment Tribunal (ET), his case had been prepared by the CAB solicitor who, at that time, was funded through legal aid to work on specified employment problems. As is discussed elsewhere in this book, the Coalition Government's cuts in legal aid have had a dramatic impact on access to justice, and if Brian had turned up at this CAB a year later it is highly unlikely that he would have had that level of support from someone who was legally qualified.

He was lucky in another respect: he did not have to pay any fees to get his case heard by an ET. The introduction, in July 2013, of fees to be paid by workers making claims, has dramatically altered the field of access to justice in employment disputes, initially reducing claims to the ET by 79 per cent.<sup>1</sup> However, even before the introduction of fees, those seeking justice faced many barriers. ETs do not always provide an 'easily accessible, speedy, informal and inexpensive' procedure for the settlement of disputes as intended by the

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<sup>1</sup> The overall number of claims between October and December 2013 was down 79% on the same period in 2012 according to the Ministry of Justice's statistics – see: [www.gov.uk/government/publications/tribunal-statistics-quarterly-october-to-december-2013](http://www.gov.uk/government/publications/tribunal-statistics-quarterly-october-to-december-2013).

Donovan Commission in its influential report.<sup>2</sup> The complex nature of contemporary employment law means that, without careful and expert preparation by a solicitor, cases such as Brian's are unlikely to succeed; many potential claimants, faced with having to 'go it alone', do not have the confidence to go to a tribunal.

In this chapter we explore the issues surrounding access to justice for workers against the backdrop of cuts to legal aid, the imposition of fees and other recent amendments to the already complex, restrictive and highly technical labour law framework.<sup>3</sup> The financial crisis and associated austerity measures have been cited by government as justification for these changes. We argue that their effect has been far more extensive and damaging than would be proportionate even in response to the deepest structural recession.<sup>4</sup> The net result is likely to

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<sup>2</sup> *Report of the Royal Commission on Trade Unions and Employers' Associations 1965–1968*, known as the 'Donovan Commission' (Cmnd 3623, 1968) (London, HMSO) 157, para 578, which extended the jurisdiction of the (then) industrial tribunals to all employment disputes relating to the contract of employment or statutory employment claims.

<sup>3</sup> In this chapter, we use the term 'labour law' (rather than 'employment law') wherever possible as it has a wider scope which encompasses collective labour rights as well as those which arise out of the contract of employment and, thus, tend to be of an individual nature. Although the two terms are often used interchangeably, the distinction is important, particularly in light of what Keith Ewing has termed 'the democratic purpose of labour law', see K Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) *Industrial Law Journal* 103. Government policy and related documentation increasingly refer to 'employment law' which is symptomatic of the individualisation of the regulatory model as discussed in this chapter.

<sup>4</sup> See D Mangan, 'Employment Tribunal Reforms to Boost the Economy' (2013) 42(4) *Industrial Law Journal* 409 in which the author argues that, under recent 'austerity' reforms, employment rights have been delegated to second place – or worse – as tribunal procedure is commandeered as a tool for economic stimulation rather than a source of rights protection.

be a further exacerbation of pre-existing inequalities of power between workers and employers which will be felt to such an extent that labour law is in severe danger of losing its democratic function.<sup>5</sup>

We begin by considering the operation of the labour market, the nature of employment relations and methods for resolving workplace disputes within the wider access to justice landscape, including the shifts in that landscape over the last 15 years or so. Using data from our research project, ‘Citizens Advice Bureaux and Employment Disputes’<sup>6</sup> we are able to provide some salient examples of the impact of the current system on the experiences of a group of claimants to the ET. As some of these personal stories demonstrate, the denial of access to justice for those seeking redress against often powerful and unscrupulous employers can have devastating and long-lasting effects on the lives of individuals and their families. We argue that the current system does not provide a suitable and effective forum for resolving workplace disputes and that recent government reforms have exacerbated, rather than improved, pre-existing problems with the ET system, particularly for workers who experience unlawful treatment at work such as discrimination, unfair dismissal or non-payment of wages. We conclude by suggesting some alternative approaches by which employment disputes could be resolved or avoided while ensuring access to justice for both parties.

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<sup>5</sup> Identified by Ewing (n 3) as ‘importing public law principles – in the widest sense of that term – into the private relationship between employer and employee’.

<sup>6</sup> Funded by the European Research Council as part of a Starter Investigator Grant: ‘New Sites of Legal Consciousness: a case study of UK advice agencies’, Proposal no: 284152.

## Surveying the Terrain

Since 2012, the policy and legal frameworks within which ETs operate have been dominated by some fundamental changes. These are having a profound effect on the ways in which viable claims are resolved (or not) due to their impact on the decision-making processes of and opportunities available to claimants. Such changes relate specifically to the Coalition's reform of the employment law framework, including the increase to the qualifying period for unfair dismissal claims from one year to two years,<sup>7</sup> the imposition of a fees regime<sup>8</sup> and the introduction of the Acas early conciliation scheme.<sup>9</sup> The Coalition has rationalised these changes on the basis of a particular characterisation of the current system as being 'in crisis' and, thus, in need of reform and has articulated and promoted a specific diagnosis of what is going wrong and how to fix it. As explored below, the political rhetoric underpinning this diagnosis, which has been consistently advanced as a means of justifying recent reforms and of defending their impacts, asserts that ETs are a licence for employees to make unmerited or vexatious claims. We assert that this particular line of argument lacks any evidential basis

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<sup>7</sup> The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 came into force on 6 April 2012.

<sup>8</sup> The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 came into force on 31 July 2013.

<sup>9</sup> The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 came into force on 6 April 2014.

and is ideologically grounded forming part of a wider ongoing strategy of deregulation of labour rights. The most obvious example of this is the imposition of fees.

## The Impact of Fees on Workers' Access to Justice

On 29 July 2013 fees were introduced for those taking claims to an Employment Tribunal in the UK (except Northern Ireland). The fee structure for individual claims has two levels depending on the complexity of the claim. Straightforward claims for defined sums are classified as 'Level 1 Claims' and include such actions as unauthorised deductions from wages or redundancy payments. A fee of £160 is payable when the claim is lodged and a further £230 when the hearing begins. 'Level 2 Claims' involve more complex issues including unfair dismissal, discrimination and equal pay and attract a fee of £250 when the claim is lodged and a further £950. Cases which go on appeal to the Employment Appeal Tribunal (EAT) attract an initial fee of £400 and a hearing fee of £1200. There is also a fee structure for multiple claims which arise where two or more people bring proceedings arising out of the same facts, usually against a common employer: claims involving between two and 10 claimants are charged twice the applicable single fee; those involving between 11 and 200 claimants, four times the applicable single fee; and those with over 200 claimants, six times the applicable single fee. A waiver process, known as 'remission', by which individuals on

low incomes are able to apply for a complete or partial exemption from fees was introduced alongside the fees regime.<sup>10</sup>

In the 2013 Survey of Employment Tribunal Applications, which was conducted prior to the introduction of fees, 49 per cent of the 2,000 claimants surveyed stated that a fee of £250 would have influenced their decision to go to the tribunal.<sup>11</sup> official statistics for January-March 2014 record an overall drop of 81 per cent in the number of claims brought to the ET post-fees as compared with the same period predating their introduction.<sup>12</sup> This has been referred to as ‘a victory for bad bosses’ (TUC press release 29 July 2014), ‘a major barrier to access to justice’ (Law Society of Scotland press release 28 July 2014) and identified as being likely to deter individuals from making valid claims against employers (CAB press release 27 July 2014). In the face of such criticism of its flagship policy, the Government remained resolute, claiming that it is not right that ‘hardworking taxpayers

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<sup>10</sup> See the Schedule to The Courts and Tribunals Fee Remissions Order 2013, SI 2013/2302. At the time of writing, the scheme has been amended twice since its introduction and the rate of successful applications has been considerably lower than expected. In its original impact assessment of tribunal fees the Ministry of Justice predicted that 31% of claimants would be eligible for fees, see: [www.legislation.gov.uk/ukia/2013/1039/pdfs/ukia\\_20131039\\_en.pdf](http://www.legislation.gov.uk/ukia/2013/1039/pdfs/ukia_20131039_en.pdf). However, according to information contained within a written answer in the House of Commons, only 24% of remission applications made between July and December 2013 were successful, representing only 5.5% of the overall number of claims for the period (HC Deb 12 May 2014, col 418W).

<sup>11</sup> See *Findings from the Survey of Employment Tribunal Applications* (Department for Business, Innovation & Skills, 2013), available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf), 38.

<sup>12</sup> See: [www.gov.uk/government/publications/tribunal-statistics-quarterly-january-to-march-2014](http://www.gov.uk/government/publications/tribunal-statistics-quarterly-january-to-march-2014).



should pick up the bill for employment disputes in tribunals’ and that ‘It is reasonable to expect people to pay towards the £74m bill taxpayers’ face for providing the service’.<sup>13</sup>

In the pre-fees environment a particular story dominated political discussions of the ET system. In this story there were ‘too many’ claims made by employees resulting in an overloaded tribunal system which was unable to manage its own case-load. Such claims were largely vexatious as workers sought financial gain through a ‘compensation culture’ against innocent employers unfairly targeted. Even where claims were ostensibly legitimate, they were viewed as being burdensome for business, acting as a disincentive for employers to hire staff in a time of austerity and economic downturn.<sup>14</sup>

Our research tells a very different story in which employers’ power over workers predominates in a way which is completely at odds with the intentions underlying labour law’s origins. Following publication of the first reliable evidence showing the impact of fees, the Government’s stated rationale appears to have shifted: rather than being a response to too many vexatious claims, fees are now heralded as a means of recouping the financial burden

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<sup>13</sup> Statement by Justice Minister Shailesh Vara, 28 July. This overlooks the fact that most claimants are also tax payers, or at least were at the time that the dispute with the employer arose, and are, thus, paying twice over.

<sup>14</sup> Addressing the Engineering Employers’ Federation in November 2011, Business Secretary Vince Cable confirmed the Government’s plans ‘to radically reform employment relations’ and spoke about ‘a widespread feeling it is too easy to make unmerited claims’ (see: [www.gov.uk/government/speeches/reforming-employment-relations](http://www.gov.uk/government/speeches/reforming-employment-relations)). When announcing the increase in the qualifying period for claiming unfair dismissal from one to two years, Chancellor George Osborne stated, ‘We respect the right of those who spent their whole lives building up a business, not to see that achievement destroyed by a vexatious appeal to an employment tribunal. So we are now going to make it much less risky for businesses to hire people’ (see: [www.conservatives.com/News/Speeches/2011/10/Osborne\\_together\\_we\\_will Ride\\_out\\_the\\_storm.aspx](http://www.conservatives.com/News/Speeches/2011/10/Osborne_together_we_will Ride_out_the_storm.aspx)).

for the taxpayer.<sup>15</sup> This can only encourage speculation that, when faced with a 79 per cent drop in claims and a complete lack of evidence that such a dramatic reduction was the result of a fall in vexatious claims, ministers seized on an alternative justification.

Whatever the political rhetoric, fees are only one part of a much bigger picture. Even before the Coalition's preoccupation with reforming the ways in which employment disputes are dealt with, the ET system was the focus of political interest and the pre-Coalition picture was far from satisfactory. A pilot study conducted in the pre-fees era found that the process of taking a claim to an ET was experienced as overly legalistic, time-consuming and extremely stressful.<sup>16</sup> Those claimants who managed to navigate their way through the

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<sup>15</sup> This was always evident in the background documents (see the Impact Assessment cited in n 10) but now took centre stage. In 2012, the MoJ estimated that £10 million would be recouped from ET fees which represented a dramatic reduction from the original 'cost recovery target' of 33% which would have produced annual fee income of £25 million. However, according to the HMCTS Annual Report and Accounts for 2012–13 (www.justice.gov.uk/downloads/publications/corporate-reports/hmcts/2014/hmcts-annual-report-2013-14.PDF, 85) the actual amount recouped following the dramatic reduction in claims was £5 million representing 6.7% of costs.

<sup>16</sup> See M McDermont and N Busby, *Barriers to Justice in the Employment Tribunal System: Report of Pilot Research Project*, available at: [www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/publications/barrierstojustice.pdf](http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/publications/barrierstojustice.pdf); N Busby and M McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41(2) *Industrial Law Journal* 166. See also J Aston et al, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (DTI Employment Relations Research series no 55, 2006); M Peters et al, *Findings from the Survey of Claimants in Race Discrimination Employment Tribunal Cases* (DTI Employment Relations Research series no 54, 2006); and A Denvir et al, *The Experiences of Sexual Orientation and Religion or Belief Discrimination Employment Tribunal Claimants* (Ref: 02/07 Acas, 2007) 150.

process to a full hearing found the court-like procedures baffling and alienating.<sup>17</sup> The reason for this has been convincingly explained as arising out of a process of ‘institutional isomorphism’ by which an organisation becomes similar to another which operates in the same field where both experience coercive pressures by the body controlling their resources, in this case government.<sup>18</sup> By this process the ETs have adopted the paradigm of the more established civil courts with the added influence of the normative effect of the common culture and key values of judges and legal representatives arising from their shared legal education and role socialisation. Furthermore, isomorphism has been identified as contributing to the ongoing juridification of employment relations,<sup>19</sup> which is largely the result of institutional pressures to conform including direct public policy interventions.

Such policy is part of an incremental but persistent movement away from collective dispute resolution by which trade unions and employers traditionally worked together through the process of collective bargaining to agree terms and conditions, dealing with disputes through negotiated settlements. In place of this process, employment relations have become increasingly individualised so that workers are deemed implicitly or expressly to have accepted pre-existing terms and conditions on the commencement of employment as part and parcel of a private contractual arrangement. Within this framework, disputes too are privatised with the expectation that the individual employee will deal retrospectively with any breach of contractual or statutory obligation by his or her employer on a one-by-one basis.

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<sup>17</sup> Busby and McDermont (n 16).

<sup>18</sup> S Corby and PL Latreille, ‘Employment Tribunals and the Civil Courts: Isomorphism Exemplified’ (2012) 41(4) *Industrial Law Journal* 387.

<sup>19</sup> *ibid.*

This seismic shift away from collective bargaining and associated forms of industrial action, which generally encouraged a proactive approach to managing disputes *before* they escalated, has unsurprisingly led to a growth in the types of disputes which, if formalised, are likely to result in tribunal cases. Furthermore, in certain circumstances, the disintegration of collective power has meant that some workers now find themselves classified as self-employed or without any clear employment status and thus outside the scope of ‘employment law’ and the guaranteed protections that it, at least ostensibly, provides.

Of course not all of this change can be attributed to the Coalition Government’s policy. Much of what we are now witnessing is the net result of various laws and policies enacted by previous UK governments over four decades in response to the effects of extraneous forces associated with globalisation of labour markets.<sup>20</sup> Neither is this phenomena unique to the UK with the governments of all developed economies engaged in the promotion of policy which is capable of maintaining flexibility (too often through deregulation) in order to remain competitive as new markets for goods and services open up in developing countries.<sup>21</sup> However, despite sharing a similar history and many common challenges with other jurisdictions, the Coalition Government elected to take a particular path in its reform of the ET and wider labour law system. This path has been endorsed and continued by the current Conservative Government which, shortly after coming to power in

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<sup>20</sup> See A Pollert, ‘Britain and Individual Employment Rights: “Paper Tigers, Fierce in Appearance but Missing in Tooth and Claw”’ (2007) 28(1) *Economic and Industrial Democracy* 110.

<sup>21</sup> See further B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) and B Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge, Cambridge University Press, 2007).

May 2015, introduced the Trade Union Bill which, among other things, proposes to raise the threshold required for legally constituted strike ballots and to enable employers to replace striking staff with agency workers. At the time of writing, the bill had passed its second reading in the House of Commons. If enacted, the bill will significantly restrict collective action by workers which is likely to result in the further individualisation of dispute resolution highlighted in this chapter on which we will now focus.

### The ET System Under Review (2001 to 2015)

In 2001, the Labour Government instigated a consultation exercise on dispute resolution and tribunal reform. The resulting report entitled *Routes to Resolution: Improving Dispute Resolution in Britain*<sup>22</sup> set out the (then) government's vision for resolving disputes in the workplace based on three key principles: access to justice; fair and efficient tribunals; and a modern user-friendly public service. The rationale underlying the need for change was a perception that too many disputes were being referred to ETs without adequate efforts to resolve them in the workplace. Emphasis was, thus, placed on the early identification of grievances, encouraging employers and employees to discuss disputes and the promotion of alternative dispute resolution (ADR). In 2004, the framework provided by the Employment Act 2002,<sup>23</sup> accompanied by a revised Acas Code of Practice, was used to develop new three-step statutory disciplinary and grievance procedures with which employers and employees

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<sup>22</sup> Department of Trade and Industry (2001).

<sup>23</sup> The Employment Act 2002 (Dispute Resolution) Regulations 2004, which came into effect in October 2004.

were required to comply before a claim to the ET could be made. Furthermore, the Regulations introduced fixed time periods for Acas conciliation in place of the previous arrangements under which Acas's statutory duty to conciliate had lasted up to the point at which all matters of liability and remedy had been determined by an ET. This was intended to encourage and facilitate the parties' engagement in conciliation at an early stage rather than, as had often been the case, shortly before a scheduled ET hearing.

In 2007, recognising the failure of the statutory procedure to reduce the number of ET claims, which had in fact risen in the intervening period, the Labour Government set up an independent review of the statutory procedure. The review, carried out by Michael Gibbons,<sup>24</sup> was intended to 'to identify options to simplify and improve aspects of employment dispute resolution and make the system work more effectively for employers and employees, *while preserving employment rights*' (our emphasis).<sup>25</sup> Gibbons' view of the system was that it was costly, overly complex and resulted in too many cases going to ETs and his self-stated aim was to provide recommendations which were 'genuinely deregulatory, and simplifying'.<sup>26</sup> Unsurprisingly, Gibbons' main recommendation was the repeal of the statutory grievance and disciplinary procedures<sup>27</sup> and the introduction of a revised Acas Code which is, once again, the main source of guidance. The emphasis on mediation and early conciliation within the Code is based on Gibbons' view that:

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<sup>24</sup> *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (Department of Trade and Industry, 2007), hereinafter 'the Gibbons Review'.

<sup>25</sup> The Gibbons Review (n 24) 7.

<sup>26</sup> *ibid*, 4.

<sup>27</sup> Accomplished by the Employment Act 2008 which came into force on 6 April 2009.

Fundamentally, what is needed is a culture change, so that the parties to employment disputes think in terms of finding ways to achieve an early outcome that works for them, rather than in terms of fighting their case at a tribunal.<sup>28</sup>

This is a sentiment with which few would disagree but which undoubtedly needs to be underpinned by the principle of natural justice that requires that the right to a fair hearing is not unduly prevented where alternative methods of settlement have failed and that such a hearing should take place before an independent adjudicator – in this context a specialist employment judge. In addition, it is worth recalling that the Government's intention in commissioning the Gibbons Review was that employment rights should be preserved *alongside* a focus on ADR. With these points in mind, the actions of the Coalition Government will now be considered.

On coming to power in 2010, the Coalition Government launched itself into a frenzy of activity related to the reform, largely through deregulation, of the employment law framework. The Employment Law Review was instigated in 2010 and was aimed at reviewing laws for 'employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive'.<sup>29</sup> This was supplemented in 2011 by a consultation entitled *Resolving Workplace Disputes*, the results of which were published in January 2011 and are the source

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<sup>28</sup> The Gibbons Review (n 24) 38.

<sup>29</sup> See Employment Law Review Annual Update 2012, available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32146/12-p136-employment-law-review-2012.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32146/12-p136-employment-law-review-2012.pdf), 5.

of many of the recent reforms.<sup>30</sup> These reforms were further endorsed by recommendations made by venture capitalist Adrian Beecroft in his government commissioned review of employment law which, although prepared in October 2011, was not published in full until May 2012 amid much press coverage. Another important initiative influencing government policy and revealing its underlying rationale was the so-called ‘Red Tape Challenge’,<sup>31</sup> which ran until 2013, by which members of the public were encouraged to respond via a website to proposals to cut ‘unnecessary’ regulation. This approach was unmistakably based on a negative perception of regulation whereby there are simply too many laws in place which are overly bureaucratic and, thus, harmful to businesses and economic growth. Employment law was identified as a specific target for attention.

The Coalition’s agenda surrounding labour market regulation and the resulting reform of employment law was rationalised on the grounds that it would encourage economic growth in the face of recession as part of a more general movement towards austerity. However, as the introduction of fees demonstrates, the policy’s actual aim and impact have been to keep disputes away from the ET based on the assertion that too many claims are lodged which end in full hearings. Is this assertion correct? The number of cases has indeed increased dramatically since the 1970s but, as outlined above, the nature of industrial relations has completely changed over the intervening four decades as has the environment within which the employment relationship operates in large part due to changes in the law and in the predominant types and organisation of work.

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<sup>30</sup> Including the increase of the unfair dismissal qualifying period to two years, the ET fees regime and Acas early conciliation scheme.

<sup>31</sup> See: [www.redtapechallenge.cabinetoffice.gov.uk/themehome/employment-related-law/](http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/employment-related-law/).



In justifying its package of proposed reforms, the Government asserted that, ‘Between 2008–09 and 2009–10, the number of claims rose by 56 per cent, from 151,000 to 236,100, a record number’<sup>32</sup> and that ‘there were 218,100 claims in 2010/11, a 44 per cent increase on 2008/09’<sup>33</sup> In fact, the number of ET claims fell by 8 per cent in the (pre-fees) environment of 2010/11 compared with the previous year.<sup>34</sup> Furthermore, the headline figures cited by government, which include single claims (made by individual workers) and the total number of claimants covered by multiple claims, give a highly misleading impression of the actual workload of the ET system. Multiple claims, in which two or more workers claim against the same employer on the same or similar grounds, can (and often do) involve hundreds or even thousands of workers, yet result in a single hearing.

In addition to its creative accounting for ET statistics, the Coalition went on the offensive with senior ministers on both sides of the Coalition publicly declaring that the ‘increasing’ number of cases was due to a rise in ‘unmerited’ or ‘vexatious’ claims.<sup>35</sup> This overlooks the far more plausible explanation that the presence of a high number of cases in the system may indicate the recurrence of bad employment practices for which employers are

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<sup>32</sup> *Resolving Workplace Disputes: A Consultation* (Department for Business, Innovation & Skills, 2011), available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31435/11-511-resolving-workplace-disputes-consultation.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31435/11-511-resolving-workplace-disputes-consultation.pdf), 15.

<sup>33</sup> Ministry of Justice, Press Release, 14 December 2011, available at: [www.gov.uk/government/news/employment-tribunal-fees-to-benefit-business-and-taxpayers](http://www.gov.uk/government/news/employment-tribunal-fees-to-benefit-business-and-taxpayers).

<sup>34</sup> Annual Tribunals Statistics, 1 April 2010 to 31 March 2011 (MoJ/HMCTS, 2011) 5.

<sup>35</sup> See, eg, the quotes from George Osborne and Vince Cable cited in n 14. Compare this with our own research findings in E. Kirk, M. McDermont, N. Busby (2015) ‘Employment Tribunals: Debunking the Myths’ (at [www.bris.ac.uk/media-library/sites/policybristol/documents/employment\\_tribunal\\_claims.pdf](http://www.bris.ac.uk/media-library/sites/policybristol/documents/employment_tribunal_claims.pdf))

(rightly) expected to bear the costs. There are, after all, financial penalties attached to unfairly dismissing an employee or discriminating against a worker because she is pregnant or on the grounds of his or her race, age or disability.<sup>36</sup> To categorise those claims which do not succeed as ‘vexatious’ goes against the tenets of natural justice and overlooks a range of reasons why cases might fail, some of which amount to barriers to access to justice in themselves. The expectation that all claims should be ‘successful’ in order to be meritorious clearly detracts from the purpose of the legal system in a democratic context. Furthermore, the argument that, what is after all, a *right* to bring a claim to an ET imposes an unacceptable burden on business lacks any evidential basis as the vast majority of dismissal claims fail<sup>37</sup> and, even where they do succeed, the Government’s own research has shown that claimants face insurmountable difficulties in enforcing remedies which all too often amount to relatively low rates of compensation.<sup>38</sup>

It could, thus, be argued that the Coalition’s employment policy provided plenty of disincentives to raise claims with no investment made in actually resolving disputes. The only glimmer of hope in this respect is the Acas Early Conciliation (EC) scheme which makes it a legal requirement, in respect of all tribunal claims lodged on or after 6 May 2014, for a

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<sup>36</sup> The Employment Rights Act 1996 prohibits unfair dismissal, and the Equality Act 2011 provides a range of protected characteristics on the grounds of which workers are protected from discrimination.

<sup>37</sup> J Hendy, ‘The Forensic Lottery of Unfair Dismissal’ in N Busby, M McDermont, E Rose and A Sales (eds), *Access to Justice in the Employment Tribunal: Surveying the Terrain* (Liverpool, Institute of Employment Rights, 2013).

<sup>38</sup> *Payment of Tribunal Awards: 2013 Study* (Department for Business, Innovation & Skills, 2013), available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf).

claimant to have made an Early Conciliation notification to Acas unless an exemption applies. Although registration with Acas is mandatory, participation in conciliation remains voluntary and either party can refuse to take part or withdraw from the process at any time. The scheme has received some positive feedback from employers and employees though so far there has been no independent evaluation. However, the emphasis on this type of dispute resolution should be considered in light of the actual purpose of conciliation which is distinct from that of an ET hearing. Conciliation is a neutral process which is not concerned with the quality of the outcome or settlement, or with whether the settlement supports or undermines the social policy objectives behind the applicable legislation. The measure of success in conciliation, which is that both parties agree on the outcome, is not concerned with the reasonableness or fairness or justness of that agreement. There is, thus, an implicit but clear assumption that parties know their legal rights and understand the implications of the settlement. As Linda Dickens puts it:

Arguably there is a conflict between the search for compromise, which is at the centre of conciliation and the pursuit of rights. Conciliation (and also mediation) may be viewed as treating an alleged injustice as equivalent to a disagreement between parties.<sup>39</sup>

The Coalition's desire to keep disputes out of the ET overlooks this important distinction and assumes that claimants, rather than being the victims of injustices, are merely involved in disagreements with their employers. The circumstances which are likely to lead to an ET hearing mean that it is more probable that the claimant will be seeking to assert his or her rights rather than looking to reach a compromise with the employer. Whether a claimant

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<sup>39</sup> L Dickens, 'The Role of Conciliation in the Employment Tribunal System' in N Busby, M McDermont, E Rose and A Sales (eds), *Access to Justice in the Employment Tribunal: Surveying the Terrain* (Liverpool, Institute of Employment Rights, 2013).

actually wants to go to the ET will often depend on whether he or she feels that the dispute in which they are involved can only be remedied by a full hearing before an impartial judge, illustrating that formalism is not always a bad thing. Early conciliation is unlikely to be a viable option in such cases.

The overall impact of the reforms under the Coalition government - which looks set to be continued and exacerbated by the current Conservative Government's Trade Union Bill (if enacted) - has been to contribute further to what Keith Ewing has identified as the loss of labour law's 'democratic function'.<sup>40</sup> This is the result of an incremental move away from the inclusion and acceptance of the collective notion of solidarity within the overall framework of laws and policies which regulate the labour market towards the individualisation of work and its governance. Writing in 1995<sup>[SB1][MM2]</sup>, Ewing argued that labour (*not* employment) law could and should contribute to the recognition and achievement of social justice goals:

First, it is about recognizing the fact that the private law relationship between employer and worker serves a public as well as a private function; and it is about importing public law principles – in the widest sense of that term – into the private relationship between employer and employee. We may refer to the former as being the wider or social justice purpose of labour law; and to the latter as being the traditional or democratic purpose of labour law.<sup>41</sup>

## Researching Workers' Experiences of Tribunals

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<sup>40</sup> Ewing (n 3) 111.

<sup>41</sup> Ewing (n 3), 111

It was against this backdrop that we identified a need to understand how workers encountered and experienced law in employment disputes, focusing attention on everyday encounters with law and on how workers with employment problems subjectively experience law. Our primary influence has been the *legal consciousness* scholarship.<sup>42</sup> This was developed as a methodology by socio-legal scholars in an attempt to move away from an understanding of law as primarily mediated through lawyers, courts and other court-like legal institutions, instead focusing on people's subjective experiences in everyday encounters with law. In looking at people's interaction with law and legality in their ordinary daily lives, it examines taken-for-granted assumptions about law and is as much interested in what people do *not* think about law as what they do think.<sup>43</sup> This is one reason why advice agencies can provide researchers with a window of insight. Their rationale is to help people in dealing with everyday instances of law in dealing with debt, loss of their home, workplace discrimination, exclusion from public spaces, or the multitude of sites where citizens are having to act as 'consumers' of services as well as goods. In these 'commonplace' settings, people's legal consciousness is constructed from a myriad of experiences, education and environments, as well as within encounters with legal institutions and actors – encounters that may not be recognised as 'legal' until the advice agency names them as such. Legal consciousness, then, is not reducible to what an individual thinks about law. It is not simply an understanding of

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<sup>42</sup> eg, P Ewick and S Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago IL, University of Chicago Press, 1998); D Cowan, 'Legal Consciousness: Some Observations' (2004) 67(2) *Modern Law Review* 928; S Silbey, 'After legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323.

<sup>43</sup> LB Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' (2000) 34(4) *Law & Society Review* 1055.

legal capability that can be tested and measured, but a formation that varies across time and location, shaped by culture and experience.

We came to this research concerned about telling the stories of those unable to afford legal representation and who did not have access to trade union representation and so were most likely to find the system problematic – people like Brian.

In 2008, we conducted a pilot study for which we interviewed 10 clients who visited a CAB for an employment-related enquiry and who had submitted an ET1. This preliminary research provided us with insights into points of particular difficulty for unrepresented workers, including concerns around pre-hearing case management phone calls, the role of Acas conciliation (which for a number of our interviewees was fraught with difficulty), and a general lack of understanding of the ET system, as well as highlighting the importance of the role played by CAB advisers.<sup>44</sup> It suggested an urgent need for further research to explore how vulnerable workers can become genuine participants in processes aimed at resolving employment disputes.

We gained funding for a large-scale research project that would track CAB clients as ‘cases’ on the journeys they followed in their attempts to find resolutions to and justice in their employment disputes. The methodology was designed to bring to the fore the interactions between advice agency and client, worker and Acas negotiator, applicant and judge, as providing points at which to identify the ‘social action’ of law. Working with seven CABx in Scotland, England and Northern Ireland, we identified clients with potentially viable ET claims. We observed the initial interview between CAB adviser and client – a point at which the adviser frequently translates the client’s problems into a legal dispute that can be

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<sup>44</sup> McDermont and Busby (n 16); Busby and McDermont (n 16).

taken through the legal process of the ET.<sup>45</sup> Following this initial contact, we recruited participants and then followed them through their journeys including (where appropriate) attending the ET hearing. We interviewed clients and kept in regular contact with them, in some cases (as with Brian) right to the point where they had experienced the violence of law through the actions of the bailiffs. In all, we have been in contact with more than 130 CAB clients with employment problems. Elsewhere we detail a range of findings from this research.<sup>46</sup>

As can be seen from the first section of this chapter, the landscape for resolving employment disputes changed dramatically during the course of our research, culminating in the introduction of fees. Our research methods enabled us to capture extremely rich and in-depth data about unrepresented claimants. It is this data, which we draw on below, that has led us to conclude that, regardless of the impact of fees, the ET system is in need of drastic overhaul. In the final section, we make some suggestions for reform, but before that we consider the ways in which CABx support clients with employment disputes and present a case study of one of these clients.

## The Role of Citizens Advice Bureaux

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<sup>45</sup> M McDermont, 'Acts of Translation: UK Advice Agencies and the Creation of Matters-of-Public-Concern' (2013) 33(2) *Critical Social Policy* 218.

<sup>46</sup> Publications and reports are available from the project website: [www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/](http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/).

In 1998, Abbott argued that Citizens Advice had become a new actor in UK industrial relations due to the decline of unions and the growth in small and non-unionised firms.<sup>47</sup> Employment-related queries have always been one of the principle categories of client queries for CABx (along with debt, benefits and housing).<sup>48</sup> Government research identified CABx as the most commonly cited external providers of advice to employees.<sup>49</sup> However, the resources that CABx can deploy and their expertise in the field of employment relations is geographically varied depending on funding, availability of pro bono lawyers and other factors.<sup>50</sup> As can be seen from Table 1, the employment advice services provided by the bureaux in our study represent a range of approaches to providing client support. Two bureaux have in-house solicitors; several have workers who have developed an expertise in employment law over time; most can call on the support of solicitors with employment law expertise. Over the period of our research the bureaux in England had to change their approaches because of cuts in legal aid: for those who had received legal aid funding, services had to be restructured; for others, demand increased as other advice organisations and law centres closed or withdrew services. The three English bureaux in our study now all

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<sup>47</sup> B Abbott, 'The Emergence of a New Industrial Relations Actor – the Role of the Citizens' Advice Bureaux?' (1998) 29(4) *Industrial Relations Journal* 257.

<sup>48</sup>For current statistics see [www.citizensadvice.org.uk/about-us/difference-we-make/advice-trends/](http://www.citizensadvice.org.uk/about-us/difference-we-make/advice-trends/)

<sup>49</sup> 2008 research for the Department of Business, Enterprise & Regulatory Reform (BERR), quoted in R Dunstan and D Anderson, *Vulnerable Workers: Preliminary Findings from the Citizens Advice Client Research* (London, BERR, 2008) 3.

<sup>50</sup> On the varied quality of CAB support and advice, see A Pollert, 'The Lived Experiences of Isolation for Vulnerable Workers Facing Workplace Grievances in 21st Century Britain' (2010) 31 *Economic and Industrial Democracy* 62.



adopt a variant of the model developed by site E, that is, training up volunteers to have the skills and confidence to take on the less complex cases. As we explore elsewhere,<sup>51</sup> we found that, where a solicitor was involved he or she tended to run a case *for* the client, ‘acting on their behalf’; the client often understood little about what was going on. Where a bureau believed the client had sufficient understanding of legal processes, and/or where there were insufficient bureau resources to provide more support, clients were expected to undertake a lot of the legal work themselves.



**Table 1: Summary of participating bureaux employment advice delivery**

Site	Location	% Ethnic minorities	% JSA claimants (% males) <sup>52</sup>	CAB employment service provided
A	London borough	46	4.5 (5.3)	<ul style="list-style-type: none"> <li>Generalist advice for less complex cases; CAB advisers with more specialist employment knowledge provide basic advice and undertake limited case work up to and at ET;</li> </ul>

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<sup>51</sup> A Sales and M McDermont, ‘Justice in Employment Disputes? Early Results from a Study of the Role of Citizens Advice’ (International Conference on Access to Justice and Legal Services, London, 2014), available at: [www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/publications/](http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/publications/).

<sup>52</sup> Great Britain 3.3% (4.3%) males.

				<p>clients with potential ongoing casework needs referred to local law centre</p> <ul style="list-style-type: none"> <li>▪ Pro bono solicitor offering one session per month</li> </ul>
B	Town and surrounds, Scotland	<1	5.9 (8.3)	<ul style="list-style-type: none"> <li>▪ Solicitor, acting for clients up to and at ET</li> </ul>
C	Town and surrounds, Scotland	<1	5.7 (7.8)	<ul style="list-style-type: none"> <li>▪ CAB adviser with specialist employment knowledge (including legal training), advice up to and occasionally at ET</li> <li>▪ Generalist advisers</li> </ul>
D	Urban, England	9	4.5 (5.8)	<ul style="list-style-type: none"> <li>▪ Employment solicitor will take on some discrimination cases, up to but not at ET</li> <li>▪ Generalist employment advice provided by volunteer team, supervised by employment solicitor, for less complex cases only</li> </ul>
E	Urban, England	16	3.5 (4.5)	<ul style="list-style-type: none"> <li>▪ CAB advisers with</li> </ul>

				<p>generalist/specialist employment knowledge provide advice for less complex cases, undertaking casework, up to and sometimes at ET</p> <p>▪ Volunteer employment solicitor</p>
F	Urban, Scotland	5	6.4 (9.2)	<p>▪ CAB adviser with specialist employment knowledge (including legal training), advice up to and occasionally at ET</p>
G	Urban/rural, N Ireland	2	3.1 (3.7)	<p>▪ CAB adviser with specialist employment knowledge, advice up to and occasionally at the industrial tribunal</p> <p>▪ Cases sometimes referred to local law centre</p>

In the next section, we use the story of Rosa, a pseudonym for one of our research participants, to illustrate the issues faced by unrepresented workers attempting to access justice through the ET system.

### ***Rosa's Story***

*Rosa moved to London from southern Europe in search of work. Despite having a Master's degree, she worked as a cleaner, feeling that her English restricted her choice of work. After asking repeatedly for a written contract, she received four, one for each of her work*

locations. She was often paid late or less than she expected. Her single payslip did not state her hourly rate or hours worked but Rosa kept her own records. Eventually, Rosa could not afford the fares to work and resigned. She requested £430 of outstanding wages and was informed by her employer that she owed a similar amount for tax and an overpayment. Rosa was shocked and angry and, on the advice of a former colleague, went to her local CAB.

At her initial advice session with a pro bono solicitor, Rosa explained the issues and provided the documentary evidence she had collated. The solicitor informed her of the time frames for making an ET claim. He suggested that she fill in an ET1 form online. Rosa and the solicitor had difficulty understanding each other throughout the meeting. Having attempted to fill in the online form, Rosa went back to the CAB for help but was only offered minimal support – the bureau was under-resourced and over-stretched. Eventually she completed the form as best she could.

A date was set for a hearing, prior to which the employer named by Rosa on the ET1 (Employer A) disputed that he was Rosa's employer, claiming that she had worked for a subcontractor (Employer B). Rosa now worked as an au pair in Glasgow and her new employer (who happened to be a solicitor) assured her that the name of the company she had put on the ET1 was the same as that on the employment contract and the payslip. She helped Rosa to write to the ET explaining that she believed Employer A to be her employer and asking that she not be penalised if she had selected the wrong employer. This was accepted although Employer B never responded to the ET's correspondence.

Rosa felt uncomfortable about the prospect of attending the hearing. She was unrepresented and originally had no plans to be accompanied. She had deliberated about asking for a translator at the hearing, worried that she may not be able to say the 'magic words' to help

*her win her case. However, she decided not to ask for translation services on the grounds that such assistance would make her 'look stupid'.*

*Rosa travelled by bus from Scotland to London the day before the hearing, staying with her cousin who attended the tribunal with her. At the hearing, which took place before a judge sitting alone, Rosa was asked to explain her story, during which the judge asked a few questions and she was then asked to explain her documents: how they came about and their relevance. Employer A, who was also unrepresented, cross-examined Rosa, then provided his own evidence. When invited to question Employer A, Rosa simply shrugged her shoulders to which the judge replied, 'That's OK, you don't have to'. Employer A was asked to clarify a few points, including the contractual relationship with Employer B. The judge invited Rosa to view the page of the contract that they were referring to, which she did. When asked by the judge whether she wanted to comment, Rosa said that she didn't really know what she was looking at. Rosa became increasingly worried about time: she had booked a flight to her home country from Edinburgh. The hearing took longer than she expected and she was worried about missing the bus to Edinburgh. She could not afford to miss her bus or flight. When the judge asked her if she wanted to 'sum up', she said she had nothing to add, explaining that she had a bus to catch.*

*The judgment was given that same day: Employer B was held to be the employer and the claim against Employer A was dismissed. With respect to the unpaid wages, the judge noted that no counterevidence was provided by Employer A and that she accepted the claimant's evidence and version of events. When asked by the judge whether she understood the judgment, Rosa did not respond. The judge explained that a written judgment would be sent to all parties at which point Rosa asked the researcher to explain the outcome. She then*

*indicated that this was 'OK' to the judge. Finally, the judge remarked that Rosa would probably need to go to a law centre for help to enforce the judgment. Outside the tribunal Rosa asked the researcher whether this meant that she would 'get my money'. The ET Service wrote to Rosa explaining how she should go about obtaining her award, a process that she initiated with the assistance of her new employer. Rosa was aware of the Fast Track scheme to help her recoup the award. However, by this stage she had left her job as an au pair and did not have anyone to help her with this. In addition, she did not want to risk the £60 fee to pay for this. Rosa decided not to pursue her award any further.*

## Is Rosa's Story Typical?

The data we have collected from over 130 CAB clients over two year period tells us that the problems Rosa encountered in trying to enforce a key term of the employment contract – payment for work carried out – are not untypical. Our findings<sup>53</sup> demonstrate that CAB clients often experience fear, not knowing what to expect, intimidation due to unfamiliar language and concepts, not being able to get their points across appropriately or articulately, and not being able to use the 'fancy' language of law. We have identified a number of points at which claimants experience particular difficulties.

- **The law relating to the employment problem:** the adviser will typically inform the client of the (probable) law relating to their employment problem. However, often the client does not fully understand legal terms such as 'unfair dismissal', or how they apply to their particular situation. In a sense law remains 'out there', relevant only in a

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<sup>53</sup> See: [www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/publications/interimreport.pdf](http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/publications/interimreport.pdf).

very vague way to the participants. This may not matter when CAB advisers provide legal support to run the case. However, ignorance has consequences for clients where they deal with tribunal processes themselves. A lack of understanding at this point can limit clients' ability to fully engage with tribunal proceedings. This is only partly offset by employment judges' attempts to make employment courts less formal and 'legalistic'.

- **The process:** many participants were unaware of the standard path involved to implement their legal rights. They may engage in one aspect of the process with little or no knowledge of possible subsequent courses of action should their efforts fail to produce results. Not having a broader sense of the process contributes to participants' sense of a lack of control and feelings of isolation.
- **The potential timescales:** many participants felt that the process was defined by a sense of waiting – for the employer to act, to hear back from the CAB, for news from the Employment Tribunal Service. Participants begin to feel that their participation in the process is at the mercy of other institutions and individuals. Yet, in practice, the time periods involved are likely to be the norm for all claimants.
- **The roles of the various parties:** some participants were not sure what they were supposed to do during the process, or of the roles of a CAB adviser, of Acas or the ET. Having a better sense of who is doing what, as well as the expectations on themselves, would empower participants.
- **The potential costs:** a number of participants were fearful that they would be made to pay the employer's costs should they lose their claim. In some situations, intimidation tactics were applied by employers and their representatives. This put a small number of participants off pursuing their cases. Participants seldom had a prior sense of the psychological and emotional cost, particularly if a case went to a full hearing.
- **Attending the hearing:** almost all participants who faced the prospect of, or attended a hearing were apprehensive about it. Few had a good sense of the process involved or what would be expected of them. Many were intimidated by the unfamiliar language and concepts used in the tribunal and were concerned that they would not be able to communicate their points articulately. Our data indicate that ET judges generally attempt to ensure that participants have their say, but this does not necessarily allow them to do so as the whole experience is power infused and alien to them.
- **Enforcement:** it came as a surprise to some participants that they would not automatically receive the financial remedy awarded to them. The recoupment of awards proved problematic for many. Problems included not knowing how to go about this process, not having or wanting to risk the money involved, and the employer ceasing trading.

In the next section we make recommendations as to how some of these problems could be addressed. However, fundamentally we believe the ET system, in its present form,

will continue to fail most unrepresented workers in providing access to justice. We therefore conclude by setting out a rights-based approach to reform.

## The Future for Access to Justice in Employment Disputes

It is doubtful if ETs or their predecessors, industrial tribunals, ever met Donovan's ideal as places of 'easily accessible, speedy, informal and inexpensive' justice.<sup>54</sup> Our research findings, along with the experience of many of those currently working in the present system,<sup>55</sup> point to the need for a radical reappraisal of the whole system for providing justice in employment disputes. We would argue that such a reappraisal must start with a return to labour law's foundational principal that it should redress the imbalance of power inherent in most working relationships which is undoubtedly tipped in favour of the employer. In this final section we set out our ideas and proposals for the future of the employment disputes system that we believe should lead to a system more able to provide workers with access to justice.

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<sup>54</sup> See n 2.

<sup>55</sup> See in particular barrister David Renton's visceral account, *Struck Out: Why Employment Tribunals Fail Workers and What Can be Done* (London, Pluto Press, 2012) and also Renton's and John Hendy QC's chapters in N Busby, M McDermont, E Rose and A Sales (eds), *Access to Justice in the Employment Tribunal: Surveying the Terrain* (Liverpool, Institute of Employment Rights, 2013).



## Removing Complexity that Obscures Rights

An important first step would be to remove unnecessary complexity from employment law and return to a system of ‘labour law’. This is not the Coalition’s ‘red-tape challenge’, but rather a call to put workers’ rights back at the centre of the system. Many procedural technicalities in effect obscure and write out many rights – paying a fee being only the most blatant technicality. The travesty of the Coalition’s fees policy is that those employers who treat their workers badly now know that it is highly unlikely they will ever have to account for their actions to an independent third party because the affected worker will not be able to afford to take the dispute to an ET.

Establishing a simplified system for dealing with the less complex disputes, generally claims for unpaid wages or holiday pay, would be of benefit to many workers. These claims often amount to no more than £300. Some are dealt with by the small claims court but this is not necessarily the appropriate forum as, although the claims may be small, the specific circumstances may be complex and thus require the attention of a specialist adjudicator. For example, it may be necessary to determine who the employer is (as in Rosa’s case) before any claim can be settled. We would propose a regulatory mechanism similar to that which operates in the enforcement of minimum wage claims.<sup>56</sup> An adjudicator could consider case facts through simple written submissions, giving a decision and, where appropriate, an award. Complex cases that cannot be resolved this way could be referred to a formal hearing.

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<sup>56</sup> Note that it is HMRC which is responsible for raising court actions on behalf of workers in cases involving non-payment of the minimum wage.

## Recognising Rights Before an Independent Forum

Central to any system of workers' rights must be access to an independent forum for adjudication in cases which are not possible to resolve through internal dispute systems or by the simplified system outlined above. A key feature of our research has been the imbalance of power relations in the ET (real and perceived) between worker and employer. A return to the tripartite system of adjudication, which recognises the need to represent different interests in resolving disputes, would help to redress these imbalances. In engendering this approach, efforts should be made to make such hearings less *adversarial* and more *inquisitorial* by, among other things, removing dominant expert barristers (all too frequently pitted against the unrepresented claimant), and making room for a panel of experts to seek to understand the dispute and find a just resolution.

Even with a simplified system, many of the claimants in our research would find it very difficult to assert their rights without legal advice and representation which can be essential in ensuring that all parties are able to identify their rights and obligations and how best to articulate and apply them. To achieve this, those who are unable to pay for such assistance should be entitled to the services of a 'public advocate' provided and paid for by the state. In contemporary society the right to work, with the concomitant ability to earn a wage, is an essential element of individual freedom. A right to be legally represented in a process aimed at settling a dispute that has deprived a worker of his or her job is as fundamental as the right to legal representation when facing charges in a criminal court: in both cases, the claimant/accused is faced with a loss of liberty.

## Enabling Unrepresented Clients to Assert Their Rights

In addition to the wide-sweeping changes outlined above, which we recognise are extremely unlikely to find favour with policymakers in the current political climate, there are a number of other suggestions arising out of our research which could be implemented in the short-term.

Advice agencies and trade unions have an important role to play in the joint provision of information, advice, support and representation to workers. Unions have a wealth of experience of successfully supporting and representing workers. CAB training programmes, supported by the Citizens Advice Specialist Support Unit, ‘webinars’ and coursework, continue to provide volunteers with the skills and knowledge which enable them to support clients successfully. With the emphasis on early intervention before formal legal action, advisers interact with employers to mediate/negotiate on behalf of workers. However, because of the highly complex nature of employment law, all of the bureaux involved in our research emphasised that there was always a need for specialist legal support.

The Tribunal Service could support unrepresented claimants in a number of ways:

- Claimants should be provided with a broader understanding of the process as a whole including more information about how to prepare for a hearing and what to expect on the day, a better sense of the time frames involved at various stages and an understanding of why the process can take a long time. Clearer guidance on the roles of various actors would enable claimants to make use of the resources available to them in a more constructive and empowered way. Despite it having been submitted to rigorous ‘plain English’ tests, some of our participants found the written guidance offered by the ET Service unhelpful.
- The buildings and staff should be supportive of unrepresented claimants with the language and signage written in accessible English (with foreign language translations

available), rather than ‘legalese’. One participant was baffled by a sign in the tribunal waiting room which stated ‘Do not forget your bundles’!

- It should be made clear at all stages that self-representation is encouraged and will be supported by ET staff. Judges should be aware of the additional pressures faced by unrepresented claimants. Rosa’s lack of resources meant that she was constantly worried about whether she was going to miss her bus, leaving her unable to focus on the complexity of the proceedings.

## Enforcement of Awards

A fundamental problem with the current system is the lack of an effective enforcement mechanism as demonstrated by our case studies. Many claimants are unaware that, even if a financial award is made in their favour, the ET cannot force the employer to pay up. Brian only got his award, having suffered an inordinate amount of stress, by paying for an enforcement action. The Government’s own research<sup>57</sup> has found that less than half of all claimants given an award by the ET received full payment from their employer and 35 per cent received no payment at all. It seems particularly unjust that, having suffered the expense and stress of a hearing, a worker whose claim has succeeded (against the odds) finds that he or she has to take further legal action to get any money owed. This situation is not new: Citizens Advice has been reporting on the non-payment of ET awards since 2004<sup>58</sup> and continued to argue in 2013 that the state should play a proactive role in enforcing ET awards.<sup>59</sup> HMRC already provides enforcement officers charged with recovering payment in

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<sup>57</sup> Cited in n 38.

<sup>58</sup> R Dunstan, *Empty Justice: The Non-Payment of Employment Tribunal Awards* (CAB, 2004).

<sup>59</sup> Citizens Advice, *The Cost of a Hollow Victory* (CAB, 2013) 9.

respect of the minimum wage and tax debts. HMRC is likely to hold information on an employer's tax position which could assist in establishing viable assets, and unpaid ET awards could be added to the recovery of unpaid tax where appropriate.

## Conclusion

As we have argued throughout this chapter, the failure of the ET system to provide access to justice for workers is undeniably linked with the individualisation of employment disputes which has been taking place for several decades. Part of the solution lies in looking for new models of collective action. Rather than being confined to the employment contract, the appropriate legal framework should be able to take account of the broader purpose of labour law: to redress the imbalance of power inherent in working relationships which undoubtedly favours employers in most cases. Within the current narrow construction of employment relations, workers' rights, once fundamental to the efficient exercise of the social contract, have become aligned with an agenda driven primarily by concerns of economic necessity so that they are seen as an extravagant luxury in times of boom which can be dispensed with in a 'time of austerity'. It is vital that we reconstitute labour law's democratic function by which individual disputes once again become matters of *public concern*.

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\* The important role of the researchers on this project, Eleanor Kirk, Emily Rose and Adam Sales, is gratefully acknowledged. As a research team we collectively developed the methodology and worked through the analysis of the data. The pilot project was funded by the Society of Legal Scholars and the University of Bristol Law School. The follow-on research was funded by the European Research Council.